

FEDERAL CIRCUIT COURT OF AUSTRALIA

DVH16 v MINISTER FOR IMMIGRATION

[2020] FCCA 131

Catchwords:

MIGRATION – Application for review of decision of the Minister for Immigration – whether the delegate failed to comply with s.57 of the *Migration Act 1958* (Cth) – no jurisdictional error revealed – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5, 36, 57, 65, 91WA, 424A, 441A, 476, pt.7AA
Federal Circuit Court of Australia Act 1999 (Cth), ss.88G, 88F

Cases cited:

BGM16 v Minister for Immigration and Border Protection [2017] FCAFC 72;
(2017) 252 FCR 97; (2017) 155 ALD 450
SZBYR v Minister for Immigration and Citizenship [2007] HCA 26;
(2007) 81 ALJR 1190; (2007) ALR 609; (2007) 96 ALD 1
Plaintiff M174/2016 v Minister for Immigration and Border Protection
[2018] HCA 16; (2018) 164 CLR 217; (2018) 92 ALJR 481;
(2018) 353 ALR 600
Minister for Immigration and Border Protection v SZMTA [2019] HCA 3;
(2019) 264 CLR 421; (2019) 93 ALJR 252; (2019) 363 ALR 599;
(2019) 75 AAR 75; (2019) 163 ALD 38
BES16 v Minister for Immigration and Border Protection [2018] FCA 78
SZJBD v Minister for Immigration and Citizenship [2009] FCAFC 106;
(2009) 176 FCR 109
Mazhar v Minister for Immigration & Multicultural Affairs [2000] FCA 1759;
(2000) 183 ALR 188; (2000) 64 ALD 395
Hossain v Minister for Immigration and Border Protection [2018] HCA 34;
(2018) 264 CLR 123; (2018) 92 ALJR 780; (2018) 359 ALR 1
AYZ18 v Minister for Home Affairs [2019] FCCA 2070
AIB16 v Minister for Immigration and Border Protection [2017] FCAFC 163
ASF17 v Minister for Immigration and Border Protection [2018] FCA 1149
VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 965

Applicant:

DVH16

Respondent:

MINISTER FOR IMMIGRATION &
BORDER PROTECTION

File Number:	SYG 3529 of 2016
Judgment of:	Judge Nicholls
Hearing date:	10 December 2019
Date of Last Submission:	10 December 2019
Delivered at:	Sydney
Delivered on:	29 January 2020

REPRESENTATION

Counsel for the Applicant: Mr N. Poynder
Solicitors for the Applicant: Hunter Flood Lawyers
Counsel for the Respondent: Mr B D. Kaplan
Solicitors for the Respondent: HWL Ebsworth Lawyers

ORDERS

- (1) The name of the respondent is amended to read “Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs”.
- (2) The application made on 13 December 2016, and as amended is dismissed.
- (3) The applicant pay the respondent’s costs as agreed or taxed.
- (4) Leave is granted for the respondent to make an application *instanter* in relation to the recovery of the documents that are the subject of suppression orders made by the Court on 21 November 2017.
- (5) The application referred to in order 4 is set down for directions at **9:30am** on **11 February 2020** before Judge Nicholls at Court 8.2, Level 8, 80 William St, Sydney.

THE COURT NOTES

1. In relation to order 4 above, that the requirements of Rule 4.08 of the *Federal Circuit Court Rules 2001* (Cth) (“**the Rules**”) is dispensed with pursuant to Rule 1.06 of the Rules.

(6)

(7)

(8)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 3529 of 2016

DVH16

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

Respondent

REASONS FOR JUDGMENT

2. This is an application made on 13 December 2016 pursuant to s.476 of the *Migration Act 1958* (Cth) (“the Act”), and amended on 8 September 2017, seeking review of the decision of the Minister’s delegate made on 14 November 2016 which refused the grant to the applicant of a Temporary Protection Visa (“TPV”).
3. The evidence before the Court is contained in the following:
 - (i) The affidavit of Ms Jodie Ellen Coomber, transcriptionist made on 12 September 2017, to which is annexed a transcript of an interview of the applicant on 12 November 2012 by an officer of the Minister’s department (JEC 1), and a transcript of an interview of the applicant by the delegate on 18 March 2016 (JEC 2) (“T”).

- (ii) The affidavit of Michael John Minns, Assistant Secretary, made on 20 November 2017, with annexure.
- (iii) A bundle of relevant documents filed by the Minister and tendered into evidence (The Court Book – “CB”, “RE 1”).

Background

- 4. The background to this matter is summarised in the applicant’s written submissions to the Court. The Minister generally agreed with that summary, save for some additional points.
- 5. The applicant’s summary is as follows:

“2. The applicant is a citizen of Iraq who first arrived in Australia at Christmas Island on 29 October 2012: Court Book at p. 1 (CB 1).

3. On 12 November 2012 the applicant underwent an arrival interview (CB 2-17): Affidavit of Jodie Ellen Coomber 12 September 2017 (Coomber), Annexure JEC 1. He said that he was from Dubis, in “Karkuk” (Kirkuk), in the north of Iraq (CB 4), and he provided as identity documents copies of a National ID Card and a Citizenship certificate from Iraq (CB 5).¹ He said that he was a Sunni Moslem of Kurdish ethnicity (CB 6).

4. On 13 May 2015 the applicant was invited by the respondent to apply for a subclass 785 Temporary Protection visa (TPV) (CB 18-23).

5. On 27 July 2015 the applicant lodged his own application for a TPV (CB 80-123). In his application form he claimed to be at risk of persecution in Iraq because, as a Kurd, he was in danger from attacks by ISIS (CB 109-111).

6. In an accompanying statutory declaration (CB 115-117) the applicant referred to the persecution of Kurds in Kirkuk under Saddam Hussein, followed by terrorist attacks by ISIS in more recent years.

7. The applicant provided further copies of identification documents, consisting of:

(a) A food coupon (CB 118).

(b) An Iraq National Identity Card (CB 119-120).

(C) An Iraq Certificate of Nationality (CB 121).

8. On 25 September 2015 (CB 147) the applicant provided English translations of his identity documents (CB 141-152).

9. On 18 March 2016 the applicant was interviewed by the delegate: Coomber, Annexure JEC 2. During a break in the interview, the delegate showed the applicant's identity documents to a document examiner and, upon resumption, the delegate expressed concern and asked the applicant whether the documents were genuine. The applicant insisted that they were genuine, but the delegate nevertheless retained the documents for further examination: Coomber, Annexure JEC 2, pp. 22-24.

10. On 21 May 2016 the applicant's National Identity Card and Certificate of Nationality were provided to the respondent's Document Examination Unit (**DEU**) to be examined for authenticity²: Affidavit of Michael John Minns 20 November 2017 (**Minns**), Annexure MJM1 at p. 1.

11. On 25 May 2016 the DEU provided an "Examination Report" (**DEU Report**) (Minns, Annexure MJM1). An unredacted copy of the Minute setting out an Examination Report"³ provided (at pp. 1-4) detailed observations with regard to the physical characteristics of the two documents and whether these were indicative of fraudulent alteration of the documents or a counterfeit document. The Results/Conclusions (at p. 5) then set out why the particular physical characteristics of each document led to conclusions about the genuineness of each document. Under the heading (at p. 1) "Summary of Outcomes", the following was said (emphasis in original)⁴:

1. Original Iraqi National Identity Card numbered 00413533, issued to a male purportedly in the name of [applicant's name], with date of birth 28/03/1988. **The result is this is a legitimately manufactured document that has been fraudulently altered.**

2. Original Iraq Certificate of Nationality issued to a male purportedly numbered 0766785/K in the name of [applicant's name], with date of birth 28/03/1988.. **The result is counterfeit.**

12. On 24 June 2016 the respondent sent a letter to the applicant (CB 171-175) inviting him to comment on the following information⁵:

Information for comment: Providing Bogus Evidence of Identity to the Department

On 18 March 2016, you attended an interview in relation to your PV application. At this interview you provided a document which you claimed was your genuine Iraqi National Identity Card...This document has been forensically examined by the Department, and on the basis of the examination conducted, I have formed a reasonable suspicion that the Iraqi National Identity Card you have provided as evidence of your identity is a counterfeit document...

At the same interview, you provided a document which you claimed was your genuine Iraqi Certificate of Nationality...This document has been forensically examined by the Department, and on the basis of the examination conducted, I have formed a reasonable suspicion that the Iraqi Certificate of Nationality you have provided as evidence of your identity is a counterfeit document...

Because you have provided two bogus documents, your application for a Protection Visa must be refused in accordance with section 91W(2) of the Act, unless you are able to provide a reasonable explanation for providing the bogus document, and either provide further documentary evidence of your identity, nationality or citizenship, OR, take reasonable steps to provide such evidence.

As you have provided bogus documents to a delegate of the Minister in support of your application for a protection visa, if your application is refused by the Department, you would also fall within the description of an 'excluded fast track review applicant' under section 5(1) of the Act, unless you are able to provide a reasonable explanation for providing the bogus documents in question.

...

Opportunity to provide a reasonable explanation for producing the bogus document

As stated above, I am writing to give you an opportunity to provide a reasonable explanation for producing the two bogus documents discussed above, and to either: produce documentary evidence of your identity, nationality or

citizenship; or take reasonable steps to produce such evidence.

If the Minister is not satisfied that you have a reasonable explanation and you do not produce documentary evidence, or take reasonable steps to produce such evidence, then your visa application must be refused under section 91W(2) of the Act.

13. On 24 June 2016 the applicant sent an email to the delegate (CB 176) as follows:

hello Mr. Adam you send me email that you say my documents are (bogus document) i don't understand my documents are real what kind of prove you want me to give you for that because i don't understand please let me know thanks

14. On 1 July 2016 the delegate sent an (CB 177) email relevantly saying:

As explained in the letter I sent to you, a qualified document examiner has determined that your National Identity Card and Citizenship Certificate are bogus. Unless you can provide me with a reasonable explanation as to why you have provided bogus documents to the Department I must refuse your visa application. You also need to provide other documentary evidence of your identity, nationality or citizenship. If you cannot provide me with other documents, you should explain why you cannot get any other documents, and what steps you have taken to get any documents.

15. On 2 July 2016 the applicant sent a further email (CB 180) which relevantly stated:

i have now Paper from (Iraq Consulate) That prove my document are original not fake document i send u copy with this email and monday i will call u and tell me when i can bring you to you thanks

16. Attached to the email was a letter dated 30 June 2016 from Saad Barznje, Vice Consul of the office of the Consulate-General of Iraq in Sydney (CB 180), which verified the documents as genuine.

17. On 4 July 2016 the delegate sent an email to "info@iraqiconsulatesydney" (CB 181) which referred to the

letter from the Consulate and its author and reference number, but did not refer to the applicant, asking:

It would be greatly appreciated if the Iraqi Consulate-General could confirm that Saad Barznje, Vice Consul, signed a letter dated 30/06/2016 and addressed to the Australian Department of Immigration and Border Protection verifying Iraqi issued identity documents.

18. No response was received to the delegate's email.⁶

19. On 8 September 2016 the delegate sent the applicant an Invitation to comment on information for a protection visa in accordance with s 57 of the Act (CB 182-186). The letter:

(a) Stated that the identity documents "have been assessed to be bogus documents" (CB 182).

(b) Stated (CB 183):

Regardless of whether the documents referred to in the Consulate-General's letter were issued to [the applicant], the documents you have provided to the Department have been found to be bogus by a qualified document examiner within the Department and meet the definition of a 'bogus document' in section 5(1) of the Act. As such, I place no weight on the letter you have provided in support of your claim.

You may provide comment on the above information.

(c) Under the heading, "Opportunity to provide a reasonable explanation for producing the bogus document", The applicant was again invited to:

...provide a reasonable explanation for producing a bogus document, and to either:

- produce documentary evidence of your identity, nationality or citizenship; or*
- take reasonable steps to produce such evidence.*

20. On 19 September 2016 a solicitor now representing the applicant provided a submission to the delegate (CB 189-190) maintaining that the identity documents were genuine and verified by "the highest form of authority" available to the applicant in Sydney, being the Consulate General of Iraq."

6. [Footnotes
Omitted.]

7. The Minister's supplementary comments are as follows:

"3. The background to these proceedings has been summarised at [2]-[20] of the applicant's outline of submissions filed on 27 November 2019 (AS). The Minister generally agrees with that summary, but adds the following by way of supplementation or clarification.

*4. On 28 July 2015, the Minister's department (**Department**) wrote to the applicant relevantly to request, pursuant to s 91W(1) of the Act, that he produce evidence of his identity, nationality or citizenship for inspection: Court Book (**CB**) 124-129. That letter relevantly provided that, if the applicant produced a bogus document in response to the request and the Minister was not satisfied that he had a reasonable explanation for producing a bogus document, then, under s 91W(2), the Minister must refuse to grant a protection visa to him: CB 125. The applicant was required to respond within 14 days after receipt of the letter: CB 126. The applicant did not respond to that request within that timeframe: CB 136-152.*

5. On 25 February 2016, the Department wrote to the applicant to invite him to an interview to be held on 18 March 2016: CB 153-161. The invitation relevantly provided that the applicant should bring "originals of any identity documents [he] hold[s]" to the interview: CB 153. The applicant attended the interview and provided an Iraqi National Identity Card and Iraqi Certificate of Nationality to the delegate.

*6. On 24 June 2016, the delegate issued to the applicant a notice of seizure of bogus documents pursuant to s 487ZJ(2) of the Act (**Seizure Notice**): CB 168-170. That notice relevantly provided as follows:*

The Iraqi National Identity Card has been seized by the department under subsection 487ZJ(1) ... The reason for seizing the document is because:

- based on an assessment of the document and other available information, it is reasonably suspected that the document is a 'bogus document' as defined in subsection 5(1) of the Act, being that it is a legitimately manufactured document that has been fraudulently altered; and*

- *the document is therefore deemed to be forfeited to the Commonwealth under subsection 487ZI(2) of the Act.*

The Iraqi Certificate of Nationality has been seized by the department under subsection 487ZJ(1) of the Act. The reason for seizing the document is because:

- *based on an assessment of the document and other available information, it is reasonably suspected that the document is a 'bogus document' as defined in subsection 5(1) of the Act, being that the document is counterfeit; and*
- *the document is therefore deemed to be forfeited to the Commonwealth under subsection 487ZI(2) of the Act."*

8. In essence, the applicant arrived in Australia by boat. He subsequently made an application for the TPV. He claimed to fear harm on return to Iraq because as a Kurd he was in danger of attacks by Islamic extremists. With his application he provided, amongst other things, an Iraqi National Identity Card ("the ID card"), and an Iraqi Nationality Certificate ("the certificate").
9. The applicant was interviewed by the delegate. Amongst other matters the delegate raised concerns about the genuineness of these documents.
10. After the interview the documents were examined for authenticity by the Document Examination Unit of the Minister's department ("DEU"). A report was provided. This concluded that the ID card was legitimately manufactured, but fraudulently altered, and that the certificate was counterfeit.
11. The delegate refused the application for the TPV. The concluding findings were set out at the beginning of the decision record (CB 205):

"1. For the reasons outlined below, I find that [the applicant] (the applicant) is not a person in respect of whom Australia has protection obligations as outlined in paragraphs 36(2)(a) or (aa) and is not a member of the same family unit as a non-citizen in respect of whom the Minister is satisfied Australia has protection obligations and who holds a Protection visa of the same class as that applied for by the applicant (paragraphs 36(2)(b) and 36(2)(c) of the Migration Act 1958 (the Act)). Accordingly I refuse to grant [the applicant] a Protection visa. As [the applicant] does not satisfy any of the criteria referred to in paragraph 36(1A)(b)

of the Act, I have not considered the criteria referred to in paragraph 36(1A)(a) of the Act.

2. The applicant has provided a bogus document as evidence of their identity, nationality or citizenship. I am not satisfied that the applicant has a reasonable explanation for this action. I am also not satisfied that the applicant has produced evidence of their identity, nationality or citizenship. Accordingly, subsection 91WA(1) of Migration Act 1958 (the Act) prevents the grant of a Protection visa to [the applicant].

3. For the reasons outlined below, I also find that [the applicant] satisfies the definition of an excluded fast track review applicant in section 5(1) of the Act.”

12. The reasons for each of these conclusions were explained by the delegate in the decision record.
13. One, the delegate concluded that the applicant did not satisfy any of the criteria for the grant of the TPV as set out at s.36(2) of the Act. This was explained at [45]–[79] of the decision record (CB 211–CB 217).
14. Two, the delegate concluded that the applicant had provided bogus documents as evidence of his identity, nationality or citizenship and was not satisfied that he had provided a reasonable explanation for that conduct. The delegate noted that given those circumstances s.91WA(1) of the Act prevented the grant of the TPV. This was explained at [21]–[28] of the decision record (CB 207–CB 210).
15. Three, the delegate concluded that the applicant satisfied the definition of an excluded fast track review applicant. This was explained at [81]–[86] of the decision record (CB 217–CB 218). This had the effect that the applicant’s case was not referred to the Immigration Assessment Authority for merits review.

The Suppression Orders

16. This case was in the docket of another judge of this Court. Prior to its transfer to my docket His Honour made orders pursuant to s.88F(1)(b) (i) and s.88G(1)(a) and (b) of the *Federal Circuit Court of Australia Act 1999* (Cth), suppressing the disclosure of the DEU report other than to the lawyers involved in this case.

17. No subsequent application was made to set aside these orders. Both parties exercised appropriate care during the hearing of this matter. References in this judgment to the DEU report and what it contains are consistent with the objective of these orders.

The Grounds of the Application

18. The grounds of the application to the Court, as subsequently amended are in the following terms:

“1. The respondent failed to comply with the obligation under s 57(2)(a) of the Act to give the applicant particulars of relevant information within the meaning of s 57 (1) of the Act.

Particulars

*(a) The “relevant information” was contained in a report of the respondent’s Document Examination Unit dated 25 May 2016 which included particulars of why the applicant’s Iraqi National Identity Card and Certificate of Nationality (**the identity documents**) were considered to be “bogus documents” within the meaning of s 5 (1) of the Act.*

(b) The respondent failed to give particulars of the relevant information to the applicant.

2. The respondent failed to comply with the obligation under s 57(2)(c) of the Act to invite the applicant to comment on the relevant information.

Particulars

The applicant was not invited to comment on the relevant information. Rather, the applicant was merely invited to provide a reasonable explanation for producing a bogus document, and to either produce documentary evidence of his identity, nationality or citizenship or evidence that he had taken reasonable steps to produce such evidence.”

The Relevant Legislation

19. Section 57 of the Act was at the relevant times in the following terms:

*“(1) In this section, **relevant information** means information (other than non-disclosable information) that the Minister considers:*

- (a) *would be the reason, or part of the reason:*
 - (i) *for refusing to grant a visa; or*
 - (ii) *for deciding that the applicant is an excluded fast track review applicant; and*
 - (b) *is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and*
 - (c) *was not given by the applicant for the purpose of the application.*
- (2) *The Minister must:*
- (a) *give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances; and*
 - (b) *ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application; and*
 - (c) *invite the applicant to comment on it.”*

20. The term “bogus document” was at the relevant times defined in the Act as follows:

*“**bogus document**, in relation to a person, means a document that the Minister reasonably suspects is a document that:*

- (a) purports to have been, but was not, issued in respect of the person; or*
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or*
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.”*

21. Section 91WA of the Act was at the relevant times as follows:

“(1) The Minister must refuse to grant a protection visa to an applicant for a protection visa if:

(a) the applicant provides a bogus document as evidence of the applicant's identity, nationality or citizenship; or

(b) the Minister is satisfied that the applicant:

(i) has destroyed or disposed of documentary evidence of the applicant's identity, nationality or citizenship; or

(ii) has caused such documentary evidence to be destroyed or disposed of.

(2) Subsection (1) does not apply if the Minister is satisfied that the applicant:

(a) has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence; and

(b) either:

(i) provides documentary evidence of his or her identity, nationality or citizenship; or

(ii) has taken reasonable steps to provide such evidence.

(3) For the purposes of this section, a person provides a document if the person provides, gives or presents the document or causes the document to be provided, given or presented."

The Minister's Response to the Grounds

22. The applicant asks the Court to quash the delegate's decision. His two grounds assert two reasons why this should be done.
23. The Minister made three responses to this. The first proposition did not seek to engage directly with the grounds as pleaded. Rather, the Minister's position was that the application to the Court should be nonetheless dismissed as there was an independent reason, which did not involve s.57 of the Act for the delegate to not grant the applicant the TPV.
24. This was said to be because the delegate found, as a separate basis to the matter of the identity documents, that the applicant did not meet the criteria for the grant of the visa. As this conclusion, and the reasoning that informed it, was not challenged by the applicant before the Court,

the Minister submitted that the application is therefore misconceived and should be dismissed.

25. The second proposition is that the delegate did not breach s.57 of the Act. The third is that, even if he did, any such error was immaterial to the decision to refuse the grant of the visa pursuant to s.65(1)(b) of the Act.
26. Given what, on its face appears, to be the contradictory basis for the first and second propositions, and the second and third, it is appropriate, to first set out the consideration of the applicant's grounds as pleaded and therefore with reference to the Minister's second proposition.

The Grounds of the Application: The Applicant's Arguments

27. In essence both of the applicant's grounds, with reference to s.57(2) of the Act assert breaches of the decision maker's procedural fairness obligations to the applicant. One, that the delegate did not give the applicant particulars of "information" which came within the meaning of that term. That is, particulars of the DEU report. Two, the delegate failed to give the applicant the opportunity to respond to this information.
28. The applicant sought to frame his arguments within the following context. The applicant was not able to access the fast track review mechanism under Part 7AA of the Act, as otherwise available to applicants who arrived in Australia in similar circumstances to the applicant. This is because the delegate found that, with reference to the definition of "bogus document", by the provisions of s.5(1) of the Act, the applicant fell within the definition of an "excluded fast track review applicant".
29. Notwithstanding this, the applicant was still entitled to the statutory "natural justice" envisaged by s.57 of the Act.
30. Within this context, the applicant was denied the grant of the visa given the prohibition set out in s.91WA(1) of the Act, where an applicant is found to have given a bogus document (as in this case) as evidence of his identity, nationality or citizenship.

31. When the applicant's lengthy submissions are reduced to their essential core, and in light of the grounds as actually pleaded, the argument was that the delegate breached s.57 of the Act (in two ways) because he failed to give the applicant particulars, or relevant details, of the DEU report which the delegate otherwise considered to be the reason or a part of the reason for his decision.
32. The applicant further argued that the effect of the "exclusion" in s.91WA(1)(a) of the Act is so harsh that s.57 should be construed in a fashion which recognises what was described as the "drastic" consequences of the application of s.91WA(1) (with reference to *BGM16 v Minister for Immigration and Border Protection* [2017] FCAFC 72 ("*BGM16*") at [70] – see further below).
33. Before the Court, the applicant referred to the delegate's letter of 24 June 2016 to the applicant (CB 171–CB 175). In this letter the delegate invited the applicant to comment on information which the delegate said related to the applicant's visa application.
34. For current purposes the relevant parts of the letter are as follows (CB 171–CB 172):

"Information for comment: Providing Bogus Evidence of Identity to the Department"

On 18 March 2016, you attended an interview in relation to your PV application. At this interview you provided a document which you claimed was your genuine Iraqi National Identity Card numbered 00413533 in the name [applicant's name] [Surname illegible] and date of birth 28/03/1988. This document has been forensically examined by the Department, and on the basis of the examination conducted, I have formed a reasonable suspicion that the Iraqi National Identity Card you have provided as evidence of your identity is a counterfeit document, and therefore meets the definition of a 'bogus document' in section 5(1) of the Migration Act 1958 (the Act).

At the same interview, you provided a document which you claimed was your genuine Iraqi Certificate of Nationality with a purported certificate number 0766785/K in the name [applicant's name] and year of birth 1988. This document has been forensically examined by the Department, and on the basis of the examination conducted, I have formed a reasonable suspicion that the Iraqi Certificate of Nationality you have provided as

evidence of your identity is a counterfeit document, and therefore meets the definition of a 'bogus document' in section 5(1) of the Act.

Because you have provided two bogus documents, your application for a Protection Visa must be refused in accordance with section 91W(2) [sic: s91WA(1)] of the Act, unless you are able to provide a reasonable explanation for providing the bogus document, and either provide further documentary evidence of your identity, nationality or citizenship, OR, take reasonable steps to provide such evidence." [s.91WA(2)].

35. The applicant's argument now is that while the delegate, in effect, made reference to the conclusion reached in the DEU report, he did not give any detail as to how the conclusion was reached (and as contained in the report) so as to make the giving of information to the applicant relevantly meaningful. Nor did he give the applicant the opportunity to comment on any such detail.

36. The applicant submitted before the Court that that deficiency in the letter, and the failure by the delegate, is illustrated by the applicant's response reproduced at CB 176. In essence:

"hello Mr.Adam you send me email that you say my documents are (bogus document) i don't understand my documents are real what kind of prove you want me to give you for that because i don't understand please let me know thanks".

37. The delegate responded to this. Relevantly (at CB 177):

"As explained in the letter I sent to you, a qualified document examiner has determined that your National Identity Card and Citizenship Certificate are bogus. Unless you can provide me with a reasonable explanation as to why you have provided bogus documents to the Department I must refuse your visa application. You also need to provide other documentary evidence of your identity, nationality or citizenship. If you cannot provide me with other documents, you should explain why you cannot get any other documents, and what steps you have taken to get any documents."

38. The submission to the Court was that the delegate asked the applicant to comment on why he gave bogus documents to the Minister's department. However, he did not give the applicant details as to why

the documents were found to be bogus, so as to enable the applicant to provide meaningful comments.

39. The applicant then obtained a letter from the Iraqi Consulate-General in Sydney (CB 180). The letter, signed by the Vice-Consul, stated that the ID card and the certificate held by the applicant were “verified as genuine by the Iraqi authorities”.
40. The delegate again wrote to the applicant on 8 September 2016 (CB 182 –CB 186). This letter is considered in greater detail below. But for immediate purposes, the applicant’s submission was that while the delegate referred to s.57 of the Act in the letter (he did not do so in the earlier letter) he again made reference only to the conclusion reached by the DEU, and not to the detail as to how the DEU examiner reached that conclusion.

Consideration: The Grounds of the Application

41. As set out above, one of the Minister’s propositions in response to the applicant’s ground was that the delegate did not breach s.57 of the Act. (The second proposition).
42. The DEU report is in evidence before the Court as an annexure to the affidavit of Mr Minns. As set out above, the crux of the applicant’s complaint is that the delegate did not provide the applicant with details as to how the DEU examiner reached the conclusion that the documents in question were, in effect, bogus.
43. Section 57 of the Act is concerned with “relevant information”. There is no dispute that the delegate told the applicant, both orally and then in writing, that he had information that both the documents were bogus. At best in his written submissions the applicant argues that the delegate should have given to the applicant the “gist of the physical characteristics” of the documents which informed the conclusion of the DEU. It would appear from the written submissions, that this was the extent now of the applicant’s identification of the information that should have been, but was not, given to the applicant.
44. In submissions before the Court, the applicant sought to identify the information which he said was caught by s.57 of the Act with reference to some parts of the DEU report which dealt with observations made

by the DEU examiner in respect to certain physical characteristics of the documents.

45. Given some of the applicant's submissions before the Court, it is necessary to note that s.57 of the Act does not involve the exercise of any discretion. The section imposes a mandatory duty on the decision maker to give to an applicant particulars of "relevant information" that, relevant to current circumstances, the decision maker considers would be the reason or a part of the reason for either refusing the grant of the visa (s.57(1)(a)(i) of the Act), or for deciding that the applicant is an excluded fast track review applicant (s.57(1)(a)(ii) of the Act).
46. In the current case, the delegate did make a finding, as set out above, that the applicant did not satisfy the criteria at s.36(2) of the Act for the grant of the visa. In making this finding, it cannot be said that the delegate considered the DEU report or its conclusions, as a part of the reason for that conclusion.
47. However, as also set out above, the delegate also found that the applicant had given bogus documents to the Minister's department and that s.91WA of the Act prevented the grant of the visa in circumstances where the delegate was not satisfied that the applicant had provided a reasonable explanation for providing the bogus documents. It is in that context that the applicant presents his argument based on s.57 of the Act.
48. This then raises the question, for current purposes, as to the meaning of the term "relevant information" as it appears in s.57 of the Act and its relationship with the matter of bogus documents, and s.91WA of the Act.
49. It must be said that one of the characteristics of the Minister's submissions before the Court was a measured reliance on a number of authorities. In relation to ground one as pleaded, that is, the claimed breach of s.57 of the Act, I found the Minister's submissions in light of these authorities persuasive particularly because of the following propositions.
50. First, the information which is "relevant information" to enliven the obligation in s.57 of the Act must in its terms contain a rejection, denial

or undermining of the position advanced by the applicant (*SZBYR v Minister for Immigration and Citizenship* [2007] HCA 26 (“*SZBYR*”) at [17]).

51. Second, s.57 of the Act was specifically considered by the High Court in *Plaintiff M174/2016 v Minister for Immigration and Border Protection* [2018] HCA 16 (“*Plaintiff M174/2016*”). While the plurality in that case (Gageler, Keane and Nettle JJ) noted that the term defined in s.57 of the Act was “relevant information”, they applied what was relevantly said in *SZBYR* (in relation to s.424A) on the basis that s.57 of the Act is a “materially identical provision” to that considered in *SZBYR* (at [9] of *Plaintiff M174/2016*).
52. Third, the Minister referred to *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3 (“*SZMTA*”) (per Bell, Gageler and Keane JJ) at [10] for the proposition that s.57 of the Act does not require the decision maker to provide all of the information which might ultimately be taken into account (see also [102] per Nettle and Gordon JJ).
53. Of course, the circumstances in *SZMTA* and *SZBYR* involved s.424A of the Act and not s.57 of the Act (or s.91WA of the Act). There is a difference in focus between the two sections. Section 424A is concerned with “information” which the Administrative Appeals Tribunal considers would be the reason, or a part of the reason, for affirming a delegate’s decision, to refuse the grant of a protection visa because the relevant visa applicant did not satisfy the criteria for the grant of the visa set out at s.36(2) of the Act.
54. As set out above, in the current case, the applicant’s grounds focused on s.57 of the Act, and as explained in submissions, the operation of that section in the context of s.91WA of the Act. However, as also set out above, the principles enunciated in *SZBYR* and *SZMTA* do have application to the current circumstances.
55. Fourth, for current purposes that is made clear in *BES16 v Minister for Immigration and Border Protection* [2018] FCA 78 (“*BES16*”) (per Burley J) a case involving s.424A, but in the context, as in this case, of the provision of bogus documents which enlivened s.91WA of the Act.

56. In that case, the Court distinguished, for the purposes of s.91WA of the Act, and in the context of s.424A(1) (with parallel, as set out above, to s.57(1) of the Act), between the provision of a bogus document itself (in the absence of a satisfactory explanation for doing so) as being the reason, or a part of the reason, for affirming the decision under review on the one hand, and the detailed reasons set out in the DEU report on the other. (See *BES16* at [22]).
57. In the current case before the Court, as set out above, the applicant focused on some detail in the DEU report that he says was not given to him.
58. It is important to note, again, that the grounds as pleaded allege a breach of s.57(2)(a) and (c) of the Act, with reference to “relevant information” as that term is given meaning in s.57(1).
59. The particulars to ground one, as with the applicant’s submissions assert that the applicant should have been given details from the DEU report as to why the identity documents were considered bogus documents within the meaning of s.5(1) of the Act. That is the detail from the DEU report which explained the basis for the conclusion reached by the DEU examiner that the documents were fraudulent or counterfeit.
60. In essence, the applicant has sought to distinguish what he says were the conclusions reached by the DEU from the particulars of the reasons for those conclusions. For example, the physical characteristics of the documents as noted by the DEU examiner which informed the ultimate view of the documents. The applicant argued that without those particulars he was unable to test the DEU’s conclusions.
61. That latter submission is contradicted by the evidence before the Court. The applicant was told by the delegate that the documents were fraudulent or counterfeit. He then approached the Iraqi Consulate and obtained a letter that said the documents were “genuine”. In that light, the applicant was not deprived of the opportunity to “test” the conclusion of the DEU that, in effect, they were not. That is, he tested the conclusion of the DEU with the Iraqi authorities.

62. In any event, it must be said, the applicant's approach before the Court was to, in effect, focus on the notion of fairness in a general sense and the opportunity to comment. However, the applicant did so without properly engaging with the actual requirements of s.57 of the Act.
63. That section is not necessarily concerned with notions of procedural fairness at large, or in a general sense. There is nothing in s.57 of the Act which requires an applicant to have been told everything, or in some circumstances anything, about a DEU report as such.
64. Rather, s.57(1) talks of "relevant information" that would be the reason or a part of the reason for affirming the grant of the visa, or deciding that the applicant is an excluded fast track review applicant. Further, that that relevant information is information that is specifically about the applicant or another person, and it excludes information that was given by the applicant for the purposes of the review.
65. In short, s.57 of the Act creates a mandatory obligation on the decision maker concerning "Certain information". How that is to be construed must be informed by the relevant authorities as the Minister sought to explain before the Court.
66. The relevant question for the Court now, and as it arises from s.57 of the Act in context of s.91WA of the Act, is not as the applicant has sought to pose it. That is, was the applicant given sufficient particulars so as to be able to test for himself the methodology employed by the DEU examiner and his observations of the physical characteristics of the documents.
67. The relevant question now however is, in light of the explanation provided by the relevant authorities, what information falls within the meaning given to the term "relevant information" as set out in s.57(1) of the Act so as to enliven the mandatory obligations set out at s.57(2) of the Act.
68. In this light, and as set out above, the applicant was given information arising from the DEU report that the documents had been "forensically examined by the Department", and that the documents were assessed as being bogus documents. This was clear in the letter of 8 September 2016, and as that referred to the earlier letter of 24 June 2016.

69. Before the Court, as set out above, the applicant sought to distinguish between what he said were the conclusions reached by the DEU report and findings made by the delegate, and further as these “findings” were expressed in the letters of 24 June and 8 September 2016.
70. The DEU examiner concluded that the ID card was “a legitimately manufactured document that has been fraudulently altered”. The certificate was said to be “counterfeit”.
71. For current purposes, paragraph (b) of the definition of that term provides that a document that “is counterfeit or has been altered by a person who does not have authority to do so”.
72. In the letter of 8 September 2016, the delegate stated that the documents had been assessed to be bogus documents and were found to be such by a qualified document examiner. The applicant argued before the Court that this was, in light of what was said in the DEU report, not correct. This aspect of the applicant’s written submissions was not satisfactorily developed in argument before the Court. (See further below at [79]-[80]).
73. In any event, in the current case the “relevant information”, that is the information that was the reason or a part of the reason for refusing the grant of the visa, and deciding that the applicant was an excluded fast track applicant, was that both documents were “bogus documents”.
74. The delegate’s letter of 8 September 2016 made that clear. The letter, with specific reference to s.57 of the Act, gave the applicant the opportunity to provide a reasonable explanation for producing these bogus documents.
75. Notwithstanding the similar focus of s.57 of the Act and s.424A of the Act, as set out above, there is, for current purposes, one important difference. Section 424A of the Act requires that the “information” referred to in that section, and the invitation to comment or respond to it, must be given to an applicant (who is not in immigration detention, as in this case) by one of the methods set out in s.441A of the Act (see s.424A of the Act).
76. Section 57 however, contains no such prescription as to how the relevant information, must be given to an applicant. [Noting further

that s.53 of the Act – “Communication of Minister with applicant” – was repealed with operation on 10 August 2001, s.53, Act 58 of 2001].

77. The requirement relevantly arising from s.57 of the Act is that the Minister must give the relevant information to the applicant “...in the way that the Minister considers appropriate in the circumstances” (s.57(2)(a) of the Act).
78. I agree with the Minister that the delegate in this case gave particulars of the relevant information concerning the two documents in a separate notice given to the applicant on 24 June 2016. That is the same day as the letter of 24 June 2016 (the notice at CB 169–CB 170). The signature block to this letter reveals that the author of the notice was the delegate. (See CB 170.5 and CB 203.4).
79. In the notice the delegate relevantly stated (CB 169–CB 170):

“On 18 March 2016, you provided the following documents to a delegate of the Minister for Immigration in relation to your application for a visa:

- One Iraqi National Identity Card numbered 00413533 in the name [applicant’s name] [Surname illegible] and date of birth 28/03/1988.*
- One Iraqi Certificate of Nationality a purported certificate number 0766785/K in the name [applicant’s name] and year of birth 1988.*

The Iraqi National Identity Card has been seized by the department under subsection 487ZJ(1) of the Migration Act 1958 (‘the Act’). The reason for seizing the document is because:

- based on an assessment of the document and other available information, it is reasonably suspected that the document is a ‘bogus document’ as defined in subsection 5(1) of the Act, being that it is a legitimately manufactured document that has been fraudulently altered; and*
- the document is therefore deemed to be forfeited to the Commonwealth under subsection 487ZI(2) of the Act.*

The Iraqi Certificate of Nationality has been seized by the department under subsection 487ZJ(1) of the Act. The reason for seizing the document is because:

• *based on an assessment of the document and other available information, it is reasonably suspected that the document is a 'bogus document' as defined in subsection 5(1) of the Act, being that the document is counterfeit; and*

• *the document is therefore deemed to be forfeited to the Commonwealth under subsection 487ZI(2) of the Act."*

80. What is set out here is an accurate reflection of the conclusions reached by the DEU examiner (see Mr Minn's affidavit at page 5 of the annexures).
81. The description of the certificate as being counterfeit as it appears in the letter of 24 June 2016, and in the letter of 8 September 2016, is consistent with the description in the DEU report.
82. The description by the delegate of the ID card in the letter of 24 June 2016 as being "counterfeit" is not consistent with the DEU report. As set out above paragraph (b) of the definition of "bogus document" contains two alternatives. A document that is "counterfeit" or a document that has been altered by a person without authority to do so. The delegate referred to the first alternative, while the DEU assessor referred to the second.
83. However, the "relevant information" for the purposes of s.57 of the Act in the circumstances was that both documents were bogus documents for the purposes of the definition of that term as set out in the Act.
84. The applicant's ground now relates the claimed breach of s.57 of the Act to the failure to provide particulars of what was in the DEU report. The notice of 24 June 2016 which accurately reflected the reason as to why the DEU assessor "concluded" the document was a bogus document, was sufficient to satisfy the requirement in s.57(1) of the Act. The assessment by the DEU was the reason that the delegate found that the applicant had provided bogus documents to the Minister's department.
85. For the purposes of s.57(2) of the Act there is a distinction between the letter of 24 June 2016 which invited the applicant to comment on why he had produced bogus documents (see CB 172.6) with reference to, in context, s.91WA of the Act (CB 172.3), and the letter of 8 September

2016, which was specifically (in its first part) said to relate to s.57 of the Act (see CB 182.4).

86. In that circumstance, the applicant was invited to comment on the relevant information that: "...the documents you have provided to the Department have been found to be bogus by a qualified document examiner within the Department and meet the definition of a 'bogus document' in section 5(1) of the Act" (CB 183.7).
87. While the letter of 8 September 2016 sets out the terms of the letter of 24 June 2016, by the time of the letter of 8 September 2016 the applicant had already responded to the earlier letter (CB 183.4). The request for comments in the letter of 8 September 2016, in context related to the information set out immediately above that request. That is, it related to s.57 of the Act and not s.91WA of the Act.
88. Noting what is set out above at [75]–[77] of this judgment, the Minister also submitted that the delegate gave relevant information to the applicant at the interview conducted with him on 18 March 2016 (see "JEC 2" to the affidavit of Ms Coomber for the transcript of this interview).
89. This interview predates the letters, and notice referred to above. It is however, at the interview where the delegate first raised concerns about the applicant's two documents.
90. It is to be remembered that the DEU report concluded that the ID card had been "altered" and that the certificate was "counterfeit".
91. In this light the Minister drew attention to the following:
 - (1) The delegate raised concerns about whether the documents were genuine (T 22, line 43).
 - (2) In relation to the ID card the delegate asked whether it had been "altered" (T 22, lines 43–44) (noting that this was subsequently the conclusion reached by the DEU examiner).
 - (3) The applicant's response was "No. It is the shape that I got it." (T 23, line 1). The applicant insisted that it had not been "changed".

(4) In relation to the certificate the delegate told the applicant that it “seems like this certificate may be a photocopy” (T 23, lines 14–15).

92. In all therefore, I agree with the Minister that the “relevant information”, for the purposes of s.57(1) of the Act was put to the applicant in a variety of ways. For the reasons set out above, no other information, including the particulars or details pressed by the applicant now, appear to come within the meaning of “relevant information”. That is, information that was the reason or a part of the reason for refusing the grant of the visa, or for finding that the applicant was an excluded fast track applicant.
93. For the reasons set out above, the extent to which s.57(1) of the Act was enlivened (with reference to ground one), was that the documents were assessed by a document examiner to be, in effect, bogus documents for reason, in one case of it having been altered, and in the other, that it was counterfeit. The delegate complied with the obligation in s.57(2)(a) of the Act. Ground one of the application is not made out.
94. The next question that then arises is whether the delegate breached the obligation in s.57(2)(c) of the Act.
95. The applicant’s attack on the delegate’s approach here contained a number of elements. The central argument, however, was that the opportunity to comment provided to the applicant by both the letters of 24 June and 8 September 2016, was an opportunity to comment on s.91WA of the Act, and not an opportunity to comment on relevant information for the purposes of s.57 of the Act.
96. This was explained as follows. In the letter of 24 June 2016, the applicant was presented with a “fait accompli”. That is, the letter contained the delegate’s findings that the ID card was “counterfeit” (see above) and that the certificate was “counterfeit”. The applicant’s submissions emphasised that these were presented as findings made by the delegate.
97. The applicant’s argument was that the letter of 24 June 2016 provided the applicant with the opportunity to give a reasonable explanation for

the purposes of s.91WA of the Act, but did not provide him with an opportunity to comment on the information from the DEU pursuant to s.57 of the Act.

98. The applicant submitted that this state of affairs continued with the email exchanges between the delegate and the applicant from 24 June 2016 to 1 July 2016 (CB 176–CB 179). For example, the applicant asked the delegate what proof he needed that the documents were “real”, but the delegate’s response was essentially to repeat that a document examiner determined that the documents were bogus.
99. The applicant further submitted that the letter of 8 September 2016 was the same as that of 24 June 2016. The applicant saw the request by the delegate (at CB 183.7) for the applicant to provide comment on the “above” information (as set out in that letter) as being a reference to provide an explanation in relation to s.91WA of the Act.
100. For the reasons already set out above, I do not agree with the applicant’s characterisation of the letter of 8 September 2016. Unlike the earlier letter, and in contrast to it, the delegate made specific reference to s.57 of the Act as the primary or at least initial, reason for sending the letter.
101. While the letter, after seeking comment on the “above information” (CB 183.7), did give the applicant the opportunity to provide a reasonable explanation for producing the bogus documents, this in context must fairly be seen as a second opportunity for that purpose following what the delegate found was an unsatisfactory response to that request earlier by the applicant.
102. That is, that the applicant did not provide satisfactory documentary evidence of his identity, nationality or citizenship in light of the difficulties that the delegate had with the letter from the Iraqi Consulate. This reading of the letter is supported by the two different headings appearing at CB 182.4, and then at CB 183.8, the latter being after the invitation for the applicant to comment on the “above information”. (Headings: “Invitation to comment on information for a protection visa” and “Opportunity to provide a reasonable explanation for producing the bogus document”).

103. In short, the letter of 8 September 2016 as the headings at CB 182 and CB 183 make clear, is directed to both the invitation to comment on the information in the context of s.57 of the Act, and the second opportunity to provide a reasonable explanation for providing the bogus documents.
104. While clearly the letter could have been drafted, and structured, with greater precision by the delegate, on a fair reading, and in the context set out above, the opportunity expressed at CB 183.7 was directed to s.57 of the Act, and not s.91WA of the Act.
105. The applicant also submitted that what the delegate relevantly set out in both letters were his findings that the documents were bogus. I do not accept this submission.
106. What the delegate, plainly, set out in the letter of 24 June 2016 was that he had "...formed a reasonable suspicion...", based on the DEU report, that the documents were bogus (CB 171.9 and CB 172.2).
107. In that light, it is reasonable to accept at face value the delegate's comment in the letter of 24 June 2016 that "...I have not yet made any determination...on your case...I will take your response and any information you provide into account..." (CB 171.7), and that: "[t]he purpose of this letter is to provide you with an opportunity to respond to such adverse information..." (CB 171.5).
108. The subsequent references in the letter to the applicant having provided bogus documents (CB 172) must be read in context. It is the case that the delegate could have taken greater care with some of the expressions in the letter.
109. However, when read fairly, in context, what the delegate was saying at this part of the letter was to refer to s.91WA(1) of the Act. That is that the application "must" be refused if a bogus document has been provided unless the applicant is otherwise able to provide a reasonable explanation for having done so.
110. The letter of 8 September 2016 must be read in the same light. The reference at CB 182.5 to the documents "...you provided...have been assessed to be bogus documents..." were, when read in context, particularly given what was set out in the letter of 26 June 2016, the

notice of 24 June 2016, and the email exchanges, a reference to the assessment made by the DEU examiner.

111. While the DEU examiner did not specifically state that the documents were bogus, the assessment and conclusions he made, plainly, in the relevant statutory context, had that consequence.
112. Again, the reference in the letter to "...the documents you have provided to the Department have been found to be bogus by a qualified document examiner" (CB 183.6) was a reference to the consequence of the assessment made by the DEU examiner.
113. It is to be remembered that, drawing on the "parallel" between s.57 of the Act and s.424A of the Act, what "would be the reason, or part of the reason" as that phrase appears in s.424A, and also in s.57, has a temporal focus. That is, that it is to be determined in advance of the final determination in the case (see *SZBYR* at [17]). As the Minister submitted in *SZJBD v Minister for Immigration and Citizenship* [2009] FCAFC 106, Buchanan J, used the expression "shorn of the analytical context" (see at [104]).
114. In his submissions the applicant also appeared to criticise the following in the letter of 8 September 2016 (CB 183):

"Regardless of whether the documents referred to in the Consulate-General's letter were issued to [the applicant], the documents you have provided to the Department have been found to be bogus by a qualified document examiner within the Department and meet the definition of a 'bogus document' in section 5(1) of the Act. As such, I place no weight on the letter you have provided in support of your claim.

You may provide comment on the above information.

Opportunity to provide a reasonable explanation for producing the bogus document

I am writing to give you an opportunity to provide a reasonable explanation for producing a bogus document, and to either:

- *produce documentary evidence of your identity, nationality or citizenship; or*
- *take reasonable steps to produce such evidence."*

115. The argument appeared to be that the delegate had already determined to place no weight on the letter from the Iraqi Consulate, because the delegate had already found that the documents were bogus documents. Therefore, the opportunity to provide comments by the applicant was an empty gesture (with reference to *Mazhar v Minister for Immigration & Multicultural Affairs* [2000] FCA 1759; (2000) 183 ALR 188; (2000) 64 ALD 395 at [31]).
116. Again, it must be said that the letter could have been drafted with greater care. However, when read in context (as set out above) the following may be said. The delegate had provided the applicant with the opportunity to provide a reasonable explanation as to why, based on the assessment by the DEU, he had provided bogus documents. The reference to “no weight” was to the applicant’s response by way of the letter from the Iraqi Consulate. The delegate had received no response from the Iraqi Consulate when he sought confirmation. Further, the delegate referred to the applicant’s failure in the circumstances to provide satisfactory documentary evidence of his identity and citizenship.
117. Although not entirely clear as an abundance of caution I note that it may be possible that the applicant sought in his submissions to argue before the Court that the delegate failed to provide him with an appropriate, or proper, opportunity pursuant to s.91WA of the Act to comment on whether the documents he provided were bogus documents.
118. This was not pleaded by the applicant. In any event, I agree with the Minister that s.91WA of the Act is focused on the reasonable explanation as to why an applicant provided bogus documents, not on whether the documents were bogus or not.
119. In all, ground one and ground two in all their various iterations are not made out.

Consideration: The Minister’s Third Proposition

120. In this light, it is not strictly necessary to consider the Minister’s third proposition. In any event, I note that the proposition was explained as follows. Even if there was a breach of s.57(2) of the Act (which the

Minister says otherwise there was not) no jurisdictional error is revealed. This is because at all times the applicant maintained that the two documents had not been altered and were genuine, and as set out also in the letter from the Iraqi Consulate.

121. Therefore, the Minister argued, even if the further detail in the DEU report had been provided, as the applicant now urges, it would not have made any difference to the outcome on the visa application.
122. I understood the Minister's submissions on this latter point to rely on *Hossain v Minister for Immigration and Border Protection* [2018] HCA 34 ("*Hossain*") at [30]–[31] and *SZMTA* ([44]–[46], [49]).
123. It is the case that the applicant consistently asserted that the documents were genuine. In that light, if the delegate was required to provide the detail as asserted now by the applicant it may be at least theoretically possible, that the applicant could have used that detail to obtain his own analysis critical of the DEU report to support the proposition that the documents were genuine.
124. Equally, even though the applicant was consistent in maintaining that the documents were not bogus, it is within the bounds of reason to say that those details could have resulted in a change in his attitude.
125. However, the relevant focus is on the outcome. That is, would the provision of the information, the applicant now says should have been provided resulted in a different outcome to that found by the delegate. That is that the documents were not bogus.
126. That question relies on a degree of speculation such that I cannot be satisfied that the provision of further information would have resulted in a different outcome. Had it been necessary to determine the issue posed by the Minister's third proposition I would not have accepted the Minister's argument.

Consideration: The Minister's First Proposition

127. As set out above, the Minister's first proposition in response to the application was that there was a separate and independent basis for the decision to refuse the grant of the visa. This was a separate

consideration of the criteria for the grant of the visa with reference to s.5H of the Act and s.36(2) of the Act.

128. This did not involve any assessment, or consideration, with reference to s.91WA of the Act. Nor does the applicant's ground now allege any legal error in relation to that consideration, the findings arising from it, and the conclusion reached by the delegate.
129. The Minister's submission was that any error in the way alleged by the applicant's grounds in relation to s.57 of the Act, which consequently involved s.91WA of the Act, was not material to the delegate's decision. In that light no jurisdictional error arises.
130. The applicant's response to the Minister's first proposition was as follows. In *BGM16* the Full Federal Court considered the operation of s.91WA of the Act where the Court recorded that at [28]: "The text of s 91WA may suggest that s 91WA(1)(a) is a jurisdictional fact, especially when read in contrast to the language of satisfaction used in s 91WA(1)(b)".
131. The applicant's submission was that the relevant jurisdictional fact in the current case is the determination "required" by s.91WA(1)(a). That is, that the applicant provided bogus documents as evidence of his identity and nationality.
132. In *AYZ18 v Minister for Home Affairs* [2019] FCCA 2070, a matter in this Court, the observation was made, which appeared to have been subsequently accepted, that s.91WA of the Act evinces a two stage test. The first part of the test at s.91WA(1) is a jurisdictional fact ([117] and [124]).
133. In this light, the applicant submitted that what was said in the joint judgment in *BGM16* (at [70]) is important for current purposes:

"The final contextual matter to note is that s 91WA(1) imposes a duty on the Minister, his delegates and any merits reviewer, to refuse to grant a protection visa, thus rendering inapplicable the usual operation of s 65 of the Migration Act. The Minister is correct to submit that s 91WA(1) must not be read divorced from the exculpatory discretion in sub-s (2). However it is also the case that in considering the constructional choice, the mandatory effect of s 91WA(1) must be taken into account. In the absence of

*a reasonable explanation, the effect of the provision is to deny to the decision-maker any power to consider the merits of the protection visa application, no matter how significant those merits are. The effect is also to deny to an applicant an opportunity to claim protection in Australia, no matter how great the need is. To construe the scope of s 91WA(1)(a) as including any conduct by an applicant for a protection visa involving the provision of a bogus document to anyone at any time, and the scope of s 91WA(1)(b) as including the destruction or disposal of identity documents at any time, and anywhere, means the Court should, in our opinion, be comfortably satisfied Parliament intended the deprivation of access to Australia's protection regime to operate that widely. It is a drastic result. If that is, on a proper construction, what Parliament intended, then so be it. **But where the outcome for individuals is so serious, in our opinion the Court should be confident that is the outcome Parliament intended and the textual, contextual and purposive considerations which are said to result in that conclusion should be clear.**"*

134. [Emphasis Added.]

135. The applicant's argument was that in the current case, consistent with what was said in *BGM16*, the delegate did not have the power to consider the merits of the protection visa application given the finding arising from s.91WA of the Act which was arrived at without any consideration of the merits of the application.
136. The Minister argued that what was said by the Full Court in *BGM16* at [70] needs to be read, for current purposes, taking into account the basis on which the Minister propounds the first proposition.
137. That is, that for the purposes of this particular proposition that the Minister "assumes" a breach of s.57 of the Act, and as a result a "misapplication" of s.91WA of the Act by the delegate. Any such breach and misapplication does not, and cannot, affect the delegate's decision making power under s.36(2) of the Act.
138. The Minister's argument depended on reading, with respect, what the Court said in *BGM16* as follows. Where a determination is made pursuant to s.91WA of the Act that an applicant has provided a bogus document, then there is no power to engage in an enquiry as to the

merits of the protection visa application. That is because s.91WA of the Act requires refusal of the visa.

139. The Minister submitted, respectfully, that he took no issue with this in circumstances where the decision maker does not breach s.57 or misapply s.91WA of the Act.
140. However, the Minister's first proposition proceeds on the assumption of a breach of s.57 of the Act in relation to the matter of bogus documents. In that circumstance the Minister submitted that what the Full Court said in *BGM16* did not apply to the current circumstances. The Minister argued that there was certainly no express statement, nor was it implicit, or could be inferred, that what the Court was saying was that where the decision maker does misapply s.91WA of the Act there was no power for the decision maker to consider the merits of the protection claim.
141. To support that latter reading the Minister relied on *AIB16 v Minister for Immigration and Border Protection* [2017] FCAFC 163 ("*AIB16*") which post dated *BGM16*, particularly at [42]–[44]:

"On 20 January 2016, the delegate sent the appellant a letter informing him that his application for a protection visa had been refused, and attached the decision record. Both the letter and the decision record expressed the basis for the refusal in the same way.

First, each referred to the delegate not being satisfied the appellant met the criteria in s 36(2) of the Migration Act for the grant of a protection visa. This basis, it was not disputed, relied on the decision-making process required under s 65 of the Act.

Second, the letter and the decision record then stated that the application was "also refused" under s 91W(2) of the Migration Act, because the appellant had produced a bogus document in response to a request to provide documentary evidence of identity, nationality or citizenship, without a reasonable explanation for the production of the bogus document."

142. The Minister submitted that the delegate in the current case made similar findings ([1]–[2] at CB 205 – and see [9] above in this judgment). The Court in *AIB16* did not "criticise" the delegate in that case for adopting that course of action.

143. What is immediately apparent is that there is an important distinction between the circumstances in *AIB16* which gave rise to the reasoning of the Full Court, and the circumstances in the current case.

144. As was, with respect, made clear in *AIB16*, on the facts of that case (at [93]):

“We accept the Minister’s submissions about the delegate’s reasoning. In the appellant’s explanation, which he volunteered, there was a common substratum of facts between his claim to fear persecution and his explanation for the provision of a bogus document. In order for the delegate to determine whether he was satisfied the appellant had given a reasonable explanation about the bogus document, it was open to the delegate to examine and assess the appellant’s claims to protection. Had the appellant’s narrative about what happened to him in Iran been accepted, it is likely the delegate would have found there was a reasonable explanation for the purposes of s 91W. However, if the delegate found the appellant’s protection claims not to be credible, it was almost inevitable the appellant’s explanation would not be accepted as reasonable. The structure of the delegate’s reasoning reflects an approach that was plainly open to him.”

145. In the current case, there is no such common substratum. There is no basis to say that the assessment of the merits of the claims could inform, either way, the consideration pursuant to s.91WA(2) of the Act. The delegate found that the applicant had provided bogus documents and s.91WA of the Act prevented the grant of the visa in the absence of any reasonable explanation from the applicant for having done so.

146. The consideration in relation to the merits of the protection visa application was separate. Indeed the Minister otherwise presses that the two sets of considerations were independent of each other. In the current case, for the purposes of the assessment of the merits of the applicants claims for the visa, the delegate, in essence, accepted the factual basis for the applicant’s claim to fear harm. But found that the applicant did not satisfy s.36(2) of the Act for the grant of the visa based “...primarily on the country information discussed above” ([68] at CB 215).

147. The Minister also relied on *ASF17 v Minister for Immigration and Border Protection* [2018] FCA 1149. In that case the delegate found

that the applicant had provided a bogus document and that this required refusal of the visa pursuant to s.91WA of the Act. Nevertheless, the delegate in that case then proceeded to consider the applicant's claims to protection ([15]–[16]). The delegate found that the applicant did not meet the criteria for the grant of the visa (at [20]).

148. The Minister submitted that there was no subsequent finding, even comments, by the Court that this was not a course open to the delegate in that case.
149. The applicant was unrepresented in that case. The Court found that there was some difficulty with the grounds of the appeal (at [35]). I note respectfully, that given the circumstances, and how the case was presented to the Court, there was no occasion, or necessity, for the Court to consider the issue now raised by the Minister's first proposition. Those parts of the judgment relied on by the Minister now, as set out above, appear in the setting out of the factual background to that case. With respect, there is nothing in the Court's subsequent reasoning to assist the Minister now.
150. There is difficulty in accepting the Minister's submission as to what a Court did not say (similar also in part to his argument in relation to *BGM16*) as then establishing a positive proposition on which this Court can then proceed.
151. Ultimately, the Minister's first proposition suffers from one important difficulty. The Minister proposes that the Court proceed on an assumption, for the purposes of the first proposition, which the Minister otherwise squarely rejects for the purposes of his second proposition. Importantly, it is the second proposition, and not the first, which squarely addresses the grounds of the application to the Court.
152. Had the Minister conceded that the delegate had made some error in relation to s.57 of the Act and the consideration and finding in relation to s.91WA of the Act, then that may indeed have led to the conclusion which the Minister now urges in relation to his first proposition.
153. That is, that notwithstanding that error, the reason that the visa was refused was that the applicant did not meet the criteria in s.36(2) of the Act for the grant of the visa. That finding and the consideration that

informed it was separate to and independent of, the reasoning in relation to s.91WA of the Act, and therefore would not have been infected with any such error.

154. Viewed in one way, in those circumstances that finding would provide an independent basis for the decision unaffected by legal error (*VBAP of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCA 965). Even when viewed in light of *Hossain* and *SZMTA*, any error in relation to s.91WA of the Act, in the circumstances of this case, could not have materially affected the outcome (to refuse the grant of the visa) given there is no apparent error in that consideration, and nor did the applicant allege any such error.
155. However, this Court can only proceed on the facts as found. The applicant pleaded legal error in the delegate's use of s.57 of the Act, and with consequent impact on the findings in relation to s.91WA of the Act.
156. The Minister, it must be said vigorously and comprehensively, rejected that allegation. The Court agreed with the Minister. As set out above, there was no legal error arising from the delegate's decision in the way pleaded by the applicant's grounds.
157. Once the Court came to that conclusion, involving a matter of a jurisdictional fact (with reference to s.91WA(1)(a)) then that must be seen as being the reason for the delegate's decision untouched by legal error. On that basis the reason, for not granting the visa was because of the mandatory prohibition from doing so set out in s.91WA(1) of the Act.
158. Whether some other reason exists cannot, in the circumstances of this case, alter that fact. As set out above, the underlying premise to the Minister's first proposition may have, or even could have in my view, only assisted the Minister if some legal error had infected the consideration in relation to s.91WA of the Act. For the reasons set out above it did not. In the circumstances I do not accept the argument in the Minister's first proposition.

Conclusion

159. In any event, for the reasons set out above there is no jurisdictional error arising from the two grounds of the amended application to the Court, as those grounds were pleaded and explained before the Court. It is appropriate to dismiss the application. I will make that order.

I certify that the preceding one hundred and fifty-six (156) paragraphs are a true copy of the reasons for judgment of Judge Nicholls

Associate:

Date: 29 January 2020